

NO. 89-226

Supreme Court, U.S.  
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JOSEPH F. SPANOL, JR.  
CLERK

In the  
Supreme Court of the United States

OCTOBER TERM, 1989

MARY ANN TOLLIVER and PAUL FELIX  
Petitioners

versus

DR. CHARLES B. ODOM, JR.,  
Respondent,

DR. ROBERT B. THOMPSON  
Respondent,

PARISH OF LAFAYETTE  
Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

OPPOSITION OF RESPONDENT,  
DR. ROBERT B. THOMPSON

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SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARY ANN TOLLIVER and  
PAUL FELIX

Petitioners

VERSUS

DR. CHARLES B. ODOM, JR., and  
DR. ROBERT B. THOMPSON

Respondents

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STATEMENT OF THE CASE:

Respondent, Dr. Robert B. Thompson, essentially has no objections to the statement of the case as set forth by applicant in its petition for writ of certiorari, with the exception of one incomplete statement. On Page Five (5) of applicants' petition, it is stated that in a letter dated February 24, 1987, Dr. Thompson informed the District Attorney for the Fifteenth Judicial District of Louisiana of Dr. Odom's dropping experiments and recommended criminal prosecution. However, applicant fails to inform the Court that Dr. Thompson had, in fact, already reported the dropping incident to the District Attorney's Office and that was done immediately upon being notified of the dropping experiments on December 26, 1986. At the time Dr. Thompson notified the District Attorney's Office, he was instructed not to inform the parents of the infants of the experiments until such time as the District Attorney's Office had had an opportunity to conduct an investigation into the matter. In Mid-February, 1987, Dr. Thompson was given authority by the District Attorney's Office to notify

the parents of the actions of Dr. Odom, and at that time did in fact notify petitioners herein. (App. at A-1).

### SUMMARY OF ARGUMENT:

Petitioners herein can not state a viable cause of action under 42 U.S.C. Sect. 1983, because this Court would have to recognize a completely new liberty interest that has never been recognized by any Federal Court.

### ARGUMENT:

The specific issue raised by petitioners herein has never been specifically addressed by this Court or any inferior Federal Court with a similar factual background as exists herein. This Court as well as the inferior Federal Courts have of course recognized certain liberty and privacy rights under the Fourteenth Amendment, and a violation thereof, may give rise to a cause of action under 42 U.S.C. Sect. 1983. Petitioners suggest that the Fifth Circuit Court of Appeal decided this case in a manner inconsistent with precedence of this Court and it is respectfully submitted by respondent herein that that is incorrect. The Federal Courts have never been faced with the issue that is raised in this particular case, and accordingly, the Fifth Circuit did not decide the case in a manner inconsistent with existing precedent.

Petitioners have essentially asked this Court to recognize a new liberty interest protected by the Fourteenth Amendment, which has never been recognized by any Court in the past. As pointed out by the Fifth Circuit in *Rutherford v. United States*, 702 F.2d. 580 (1983),

“the implication of non-textual substantive rights from the general monitions of the due pro-

cess clause is a matter not to be undertaken lightly, but only with the caution of seasoned and mature thought."

Upon reviewing this matter, it is apparent that petitioners are asking this Court to fashion a new liberty interest which has never been recognized by any Court in the past and it is submitted on behalf of respondent that there is no basis for this Court establishing such a liberty right.

Several inferior Federal Courts have in fact addressed the issue of what constitutional rights survivors of a decedent may possess. In *Fuller v. Marx*, 724 F.2d. 717 (Eighth Cir., 1984), decedent was a prisoner in the Arkansas State Prison System and while incarcerated died. The State Medical Examiner conducted an autopsy on the decedent and following the autopsy procedure disposed of the body organs. Subsequent to the burial of her husband, the widow found that certain body organs had been removed and filed suit against the medical examiner alleging a cause of action under 42 U.S.C. Sect. 1983. The widow argued that she had a property right in the body of her husband and a First Amendment right to bury her husband in a manner consistent with her religious beliefs. The Court in dismissing her claim found that she had no constitutional right to the body organs of her husband, and further, that Arkansas State Law provided an adequate remedy to assure that the organs would have been replaced in the body of her husband prior to its burial had she chosen to exercise those rights. In this case, the Court of Appeal refused to recognize a Section 1983 cause of action for the widow.

In *Trejo v. Wattles*, 636 F.Supp., 992 (Colorado, 1985), the District Court considered what constitutional rights the father of a decedent may have that would be cognizable

under Section 1983. This is essentially the same situation that the Court is faced with in the present case. In *Trejo*, the plaintiff was the father of a decedent who had been killed by police officers. The father filed a Section 1983 suit alleging that certain constitutional rights of his had been violated by the killing of his child. The specific constitutional rights of the father that were allegedly violated are as follows: 1) the parental right to his child's continued life; 2) the parental right to have his son be free from physical abuse and death; 3) his parental right to have his son be accorded equal protection under the laws; 4) his parental right to have his son freely associate; 5) his parental right not to have his son taken from him without due process of law.

The District Court found that none of these alleged constitutional rights are cognizable under Section 1983 except the father's parental right to have his son freely associate. Essentially, what the Court found was that decedent would be the only party to have a cause of action to be free from physical abuse and to be given equal protection under the law. The parents of the child have no such constitutional rights according to the rationale in the *Trejo* case.

This is essentially the same situation that the Court is presented with in the case at bar. The parents of the decedent simply have no constitutional rights such that they can allege a viable cause of action under Section 1983.

The only manner in which petitioners can state a valid cause of action under Section 1983 is if this Court establishes a completely new liberty interest which has never before been recognized for purposes of Section 1983 liability. As pointed out by Justice Rehnquist in *Parratt v. Taylor*, 101 S.Ct. 1908, 451 U. S. 527, 68 L.Ed.2d. 420,



“to accept respondent’s argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under ‘color of law’ into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning ‘would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States’.” (Citations Omitted)

“We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.”

It is submitted by respondent herein that petitioners are asking this Court to superimpose the Fourteenth Amendment’s guarantee of due process under the law over State Law, which provides an adequate remedy for any damages that may be recoverable in this matter. If the court gives the petitioners the relief which they are seeking, this Court must recognize a new liberty interest that is protected by the Fourteenth Amendment and it is simply not justified in this case.

**CONCLUSION:**

For the reasons set forth above, respondents herein would respectfully submit that petitioners are not entitled to a grant of the writ of certiorari since the case has been decided by the Fifth Circuit in a manner consistent with existing precedent under 42 U.S.C. Sect. 1983.

Respectfully submitted;

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## C E R T I F I C A T E

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served upon all counsel of record by placing a copy of same in the United States mail, postage prepaid and correctly addressed, including:

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Lafayette, Louisiana, this 30th day of *August*, 1989.

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JAMES R. SHELTON, No. 12001



APPENDIX A

the coroner's office.

Q. But it's under your control as coroner?

A. Under my direction. I don't direct unless there is trouble.

Q. Is it the practice or procedure of your office to outline in detail to the survivors, such as Mrs. Arnaud, here step by step what will be done to the corpse?

A. Not at all.

Q. Why not?

A. Because usually I find that the family of the deceased is emotionally upset enough that there is no point in putting a load on them that would not do anything to alleviate their misery, their unhappiness, or their sadness.

Q. That's well understandable.

Why did you — you said it was not until late February that you went to the parents of the Francis and Arnaud infants to tell them what happened?

A. Yes.

Q. Why did you do this?

A. Why did I do what?

Q. Go to the Arnaud parents.

A. I wanted to go to tell them the moment I found out about these things.

Q. What prevented you from doing this?

A. The D. A. asked me not to until he had a chance to

investigate.

Q Why when you found out about the research of Dr. Odom did you want to tell the parents about it?

A I felt it was something they were entitled to know.

Q Why?

A This is my own belief, call it religious, moral, or whatever. This is how I felt. That the mothers and fathers of these babies should be told that things had been done to their deceased infants without my knowledge or consent, and let them know that I deplored the fact that these things happened.

Q If, indeed, harvesting of bone and tissue was going on without the permission of the survivors of the deceased, would that be without your knowledge and consent?

A Under certain procedures and situations that I